On Common Ownership of Continental Shelves

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Abstract: This paper starts with an analysis of the problems concerning disputes between various States over the delimitation of the continental shelf since the last century. Based on an analysis of the convergences between public law and private law as well as those between international law and domestic law and with reference to the regime of common ownership in the field of domestic civil law, this paper has put forward a brand new approach on the settlement of disputes over the continental shelf completely different from the principle of "shelving sovereignty and seeking joint development". Specifically, for disputes arising from the exploitation of resources on the continental shelf, this paper subsequently proposes that, on the premise that the interests between different States and international interests are taken into full account, first, the regime of common ownership should be introduced to resolve issues relating to the sovereign rights over the continental shelf, and then joint exploitation of resources should be carried out in the compulsory form of joint venture. Of course, this new principle may be affected by historical factors, national policies, international relations, etc. Therefore, different approaches should be flexibly taken so as to resolve disputes in different areas.

Key Words: Delimitation of the continental shelf; National sovereignty; Regime of common ownership; Joint development

I. Introduction

Rather than as part of the territory of the coastal State, the high seas, or international seabed area, the Continental shelf is a special sea area in which the

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coastal State may exercise its sovereign right over natural resources.[1] As one of its remarkable features, the regime of the continental shelf has made a distinction between the seabed and superjacent waters so that the coastal State can only exercise jurisdiction over the resources on the seabed and subsoil of the superjacent waters of its continental shelf.[2] With the gradual exploration and exploitation of resources in shallow seas since the middle of last century, growing attention has been paid to issues related to the ownership of continental shelves by coastal States who, based on the theory of the extension of State sovereignty, made claims on the ownership of continental shelves in coastal areas, resulting in a variety of disputes, some of which have been submitted to the ruling of the International Court of Justice and other international judiciary bodies. Up to now, such issues as the ownership of or those relating to the delimitation of continental shelves remain to be troubling many States. Although some States have temporarily settled its disputes with other States over continental shelves by signing treaties or other means, the achieved results are still far from ideal with a lot of remaining issues. Though some States managed to conduct joint exploration and exploration of resources on the continental shelves, to a great extent their disputes could be shelved temporarily only on the premise that neither of them had the capacity to maintain free reign over submarine resource without the collaboration of the other side owing to their current technological conditions. As the economic development of coastal States are increasingly dependent on submarine resources, all such existing interim measures will be confronted with various challenges under the new circumstances, and such disputes may become all the more severe with respect to the delimitation of continental shelves, and the rational allocation of resources, etc.

II. Solutions to and Existing Problems concerning Disputes over the Delimitation of the Continental Shelf

A. The Introduction of the Concept of the Continental Shelf into International Law

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1 Zeng Lingliang and Rao Geping, *International Law*, Beijing: Law Press China, 2005, p. 351. (in Chinese)

2 Deng Yongjun, A Comparative Study of the Legal Status and the Legal Regime of the Continental Shelf and Exclusive Economic Zone, *Sun Yatsen University Forum*, No. 5, 2004. (in Chinese)

The term "Continental shelf" first appeared as an official legal concept in the US Truman Proclamation in 1945.[3] The concept was then defined under Article 1 of the Convention on Continental Shelf, formulated on the United Nations Conference on the Law of the Sea in 1958, which provides that, "the term 'continental shelf' is used as referring: (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

At the third United Nations Conference on the Law of the Sea in 1973, the continental shelf became a key content under review. The legal concept of the continental shelf defined at this Conference became the main content of Article 76 of the United Nations Convention on the Law of the Sea (hereinafter referred to as the "UNCLOS") of 1982,[4] which stipulates, "the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

It follows that there is no substantive difference between relevant provisions with regard to the legal regime of the continental shelf under the UNCLOS of 1982 and those under the Convention on the Continental Shelf of 1958. However, compared with the latter, the former, when defining the concept of the continental shelf, has made new provisions on the outer edge of the continental shelf, which have pointed out clearly two specific circumstances: (1) where the outer edge of the continental margin does not extend up to 200 nautical miles from the territorial baseline, the continental shelf shall be extended up to that distance; (2) where the outer edge of the continental margin extends to more than 200 nautical miles from

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3 It was proclaimed in the statement on the continental shelf, which was published by President Truman on 28 September 1945, that "the natural resources on the subsoil and seabed of the continental shelves of high seas adjacent to the coast of the United States shall belong to the United States and be under the jurisdiction and control of the United States." This is the first legal document asserting jurisdiction of a coastal State over the continental shelf. Although it did not provide a precise legal definition of the continental shelf, it put forward a new legal concept with regard to the "continental shelf".

4 The UNCLOS was adopted on the 11th Session of the third United Nations Conference on the Law of the Sea held on 30 April 1982 and came into effect on 16 November 1994.

the territorial baseline, the outer limits of the continental shelf shall not exceed 350 nautical miles from the territorial baselines or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres. By providing for the second circumstance, not only has the interests of the States with continental shelves been protected, but also the interests and demands of other States has been properly considered and respected. Furthermore, it has also been stipulated under the UNCLOS that the coastal State shall share its incomes arising from the exploitation of the petroleum and other natural resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured with the international community, that is, the coastal State shall make payments or contributions in kind to the International Seabed Authority when it is involved in such exploitation.[5]

B. The Current Basic Principles for the Settlement of Disputes over the Delimitation of the Continental Shelf

As the disputes among the coastal States over the delimitation and ownership of continental shelves are major issues concerning the sovereignty and economic interests of States, there were serious disagreements on applicable principles even at the very beginning of the discussion on the delimitation of the continental shelves at the third Conference on the Law of the Sea held in 1973. While some States advocated to define the boundary of the continental shelf by agreement in accordance with the principle of equity and when appropriate the principle of the median line or equidistance line after various special circumstances has been taken into account, some other States proposed that the principle of the median line or

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5 According to Article 82 of the 1982 UNCLOS, the coastal State shall make payments or contributions in kind to the International Seabed Authority when it exploits the petroleum and other natural resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The payments or contributions shall be distributed to States parties to the UNCLOS, on the basis of the criteria of equitable sharing, taking into account the interests and needs of developing States. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 percent of the value or volume of production at the site. The rate shall increase by 1 percent for each subsequent year until the twelfth year and shall remain at 7 percent thereafter.

the equidistance line be deemed as the only reasonable delimitation principle.[6] However, it should be noted that any unilateral delimitation decision or any kind of international delimitation arrangement made in the absence of any interested State is neither conductive to the resolution of the dispute nor legal or invalid. From previous disputes concerning the delimitation of the continental shelf, it can be concluded that certain principles concerning the delimitation of the continental shelf have gradually taken shape:

1. The principle of "agreement & equidistance/special circumstance". This principle was stipulated under Article 6 of the 1958 Convention on the Continental Shelf: "Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line." In practice, a considerable number of continental shelves were delimitated by making certain adjustments to the equidistance line in consideration of relevant specific circumstances, rather than through simple or through compliance with the equidistance line.[7]

2. The principle of equity. Generally speaking, the principle of equity refers to the equitable and reasonable adjustment of the delimitation methods in actual continental shelf delimitation, in line with which for the purpose of equity equitable delimitation results should be achieved by adopting any equitable delimitation method.[8] This principle is of great significance in the actual delimitation of the continental shelf. As the principle of equity does not negate the principle of the median/equidistance line, the principle of the equidistance line can also be adopted in the delimitation of the continental shelf in order to achieve an equitable solution.

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6 Zhang Yaoguang and et al, Study on Delimitation of Continental Shelf in the National Jurisdictional Seas, *Geography and Geo-Information Science*, No. 3, 2004. (in Chinese)

7 Zhou Zhonghai, *International Law of the Sea*, Beijing: China University of Political Science and Law Press, 1987, p. 108. (in Chinese)

8 The concept of equity was first introduced in the ruling of the *North Sea Continental Shelf Cases* in 1969. The ICJ's ruling denied the proposition of the Netherlands and Denmark that Article 6 of the Convention on the Continental Shelf should belong to customary international law, pointing out that the continental shelf should be delimitated in accordance with the principle of equity in consideration of all relevant circumstances, so that each party concerned may obtain as many parts of the natural prolongation of its land territory as possible. Since 1969, the principle of equity had been applied widely to actual delimitation of the continental shelf, such as the 1984 *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. V. U.S.)*, the 1986 *Case Concerning Disputes over Delimitation of the Maritime Boundary (Guinea V. Guinea-Bissau)* and etc.

The provisions under the UNCLOS concerning the definition of and the delimitation of the continental shelf has provided certain legal bases for the delimitation of the continental shelf between various States in.[9] As stipulated in Article 84 of UNCLOS, "1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution. 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV." In other words, the principle of equity shall be deemed as the most fundamental principle for the delimitation of the continental shelf, for only when no agreement can be reached between interested States can interested States resort to the procedures under the UNCLOS.

C. The Problems for Traditional Solutions to Disputes over the Continental Shelf

Currently, the potential solutions to disputes over the resources on the continental shelf mainly include:

1. Delimitation by agreements. It is a common practice for States with opposite or adjacent coasts to settle disputes over sea areas on which they have made overlapping claim. As the most direct and thorough solution, it can provide stable and clear maritime boundaries and create a safe investment environment for the exploitation of maritime resource and. However, as the delimitation negotiations often take quite a long time and thus it is impossible to achieve the aim in a short time, this solution, though as the ideal solution, is not conductive to the timely and effective settlement of actual disputes.

2. Interim measures and arrangements. Before successful delimitation can be made, the following interim arrangements can be taken forms: first, stop all activities relating to the survey, exploration, and development of resource. Within the term of the agreement for interim arrangements between parties to

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9 After the Convention on the Continental Shelf was adopted in 1958, various States had signed a number of special agreements on the delimitation of the continental shelf, such as the 1974 Agreement on the Delimitation of the Continental Shelf between Japan and South Korea, the 1971 Agreement on the Delimitation of the Continental Shelf among Thailand, Malaysia and Indonesia, the 1971 Agreement on the Delimitation of the Continental Shelf between Iran and Qatar and so on.

the dispute, no activities relating to the seabed resources in the overlapping area can be carried out by any party to the dispute. By taking this solution, though peace can be maintained temporarily in the overlapping sea area, it is not conductive to the development of the resources on the continental shelf either. Second, carry out cooperation in the interim-measure area until joint development can be achieved. This kind of temporary arrangement is adopted in many an agreement on delimitation or resource management, in line with which, natural resources in the overlapping sea area can be explored and exploited under certain cooperative mechanism in the "interim measure zone" designated in a certain range of the overlapping area through agreement between interested States who temporarily shelve their dispute over sovereignty or sovereign rights as.[10] Such joint development shall not constitute the basis for supporting or denying any of the involved party's right or claim with regard to the disputed region and the resources thereon, nor create any new right or expand any existing right.[11] Since the above arrangements are only temporary, they cannot bring a though and effective solution to the dispute. After the concerned States have reached an agreement for interim arrangement, their attitudes may change with the implementation of further cooperation. In such a case, the cooperation between the involved States, which is based on the foregoing agreement, cannot be effectively bound by relevant international law. In case of a breach of the foregoing agreement by one State or any other circumstance where the foregoing cooperation cannot be continued, the dispute, even if submitted to an international resolution authority, can only be settled on the basis of principled provisions under relevant international legal instruments. Therefore, the predictability and enforceability of law cannot be guaranteed through taking this solution.

3. International litigation. At present, the method of lodging international litigations is widely applied by many States for the settlement of the dispute

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10 This institutional arrangement is consistent with the requirements of Article 74 and Article 83 of the UNCLOS. Generally speaking, the joint development of the sea area under dispute is an interim arrangement before the delimitation. It will not affect the conclusion of the final agreement or the final delimitation, nor does it mean a waiver by any party of its rights or claim for rights, nor can it be deemed as the recognition of the other party's claim for rights.

11 It was pointed out in the judgment of the *North Sea Continental Shelf Cases* that the dispute over the overlapping sea area may be settled through an agreement on joint development. The method of joint development was also affirmed in the *Continental Shelf Case (Tunisia V. Libya)*. Judge ad hoc Evensen said in his dissent: "Joint development is a fair alternative method to settle the dispute over the maritime boundary."

over the continental shelf. The States concerned have been respecting most of the judgments made by the International Court of Justice (ICJ) and have signed relevant delimitation agreements in compliance with such judgments or rulings. However, judgments made by the ICJ, which is not a supranational organization above sovereign States, are not directly binding on States. Moreover, the legal basis for these judgments is questionable, for in many cases where there are no relevant legal provisions or relevant provisions are ambiguous, such judgments are made by referring to principles applied in the settlement of the previous dispute, which is equally unpredictable and unstable. As for China, it is also reluctant to resort to international arbitration and litigation in consideration of its absolute sovereignty as well as the various situations for its disputes with its coastal neighbors. In other words, it fails to conform to China's overall interests and long-term development: to start with, the standard applied in the judgment on the previous dispute over the delimitation of the continental shelf of a certain area, which may be favorable to both parties to the dispute, might become unfavorable to China if the same standard were to be referred to in ICJ's judgment on China's disputes with other States; what's worse, the judgment on one such dispute between China and a State will case domino effect on the settlement of other disputes between China and other States.

Due to the foregoing problems with traditional solutions, disputes over the delimitation of and sovereignty over the continental shelf have been trapped in a stalemate. Various States has been always arguing for their own delimitation claim by gathering evidences that are favorable to their side and conducting a series of tentative acts such as unilateral delimitation and resource exploration, which resulted in States' protracted inability to realize effective utilization of natural resources in the disputed sea areas. In response to the stalemate, we need to change our traditional mode of thinking and take a new perspective: can we find a more reasonable solution from the relevant regimes under domestic laws? The author believes that as the classification of international law and domestic law as well as public law and private law is just based on factitious assumptions, certain content and regimes under private law can be introduced into public law and vice versa, which is especially true with the relatively new regime of the continental shelf. Specifically, though it had been the case for quite a long time in history that the legal regime of a State is dominated either by public law (e.g., the culture of public law in feudal China) or by private law (e.g., the culture of private law since the ancient Rome) since the early stage of human society, both public law

and private law have undergone healthy and complete development in the long course of history of all societies, so it is feasible that the framework of the regime of common ownership provided for under the domestic private law of China be adjusted and introduced into the regime of the continental shelf provided for under the international public law. The author of this paper holds it necessary to conduct a further analysis of relevant issues on this proposal in the preceding section.

III. The Feasibility for the Regime of Common Ownership under Civil Law to be Applied into the Settlement of Disputes over the Continental Shelf

A. Can Concepts under Private Law be Extended to the Field of Public Law?

The division of public law and private law is deeply associated with the development of human society. Roman jurists noted that as the relationship between persons was quite different from that between States, the laws governing them were different from each other in nature, on the basis of which they further divided laws into public law and private law. According to the explanation of Ulpian, "public law is the law associated with national organizations" while "private law is the law relating to personal interests"; those norms that protect national interests are "public law" and those norms that protect private interests are "private law".[12] Public law focuses on provisions on those aspects of social life where centralization and administration are necessary, such as the relationship between citizens and the State as well as the rights and obligations of the government and officials while private law focuses on provisions on those aspects of social life which should be free from the arbitrary interference of State power and where people engaged in social relations can make independent decisions in their own interests under all social circumstance according to pre-designed and typified legal norms. The goal of the public law is to maintain social order and social justice through top-down regulation of the redistribution of social resources so as to achieve distributive justice while the goal of the private law is to realize freedom and efficiency and correct the downsides of justice through bottom-up regulation of the primary

12 Pan Ping and Xu Qiangsheng, On the Outline of the Relationship between Public Law and Private Law, *Hebei Law Science*, No. 4, 2003. (in Chinese)

distribution of social resources. In essence, the relationship between public law and private law is the relationship between two different scopes and methods for the regulation of State over social members in social, economic, cultural, and other aspects, reflecting the relationship between political State and civil society.[13]

Prior to the 20th century, as the socio-economic relations were relatively simple, the differences between public law and private law were relatively distinct. However, since the beginning of the 20th century, profound changes in various social aspects have had a major impact on legislation and the concept of law, bringing about the trend of mutual transformation of public law and private law, which was started to meet higher requirement placed by the development of the society for laws to better regulate and protect the society. This trend is a reflection of the interactions between rights and interests as well as the starting point for the well-coordinated operation of private interests and public interests through their mutual transformation. The goal of this trend is neither to deny private interests, nor to expand public interests by misappropriating private interests, but rather to achieve the actual realization and expansion of private interests and to achieve those private interests which have been otherwise difficult to achieve or even unachievable in a legal regime purely compose of private law. Thus, although public interests and private interests are different in nature, they are not diametrically opposite to each other.

As stipulated in Article 4 of the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, "The People's Republic of China exercises sovereign rights over its continental shelf for the purpose of exploring the continental shelf and exploiting natural resources in the continental shelf. The People's Republic of China exercises jurisdiction in relation to construction and exploitation of artificial islands, installations and structures as well as maritime scientific research, protection and conservation of maritime environment in the continental shelf. The People's Republic of China possesses the exclusive right to authorize and manage drilling operations in its continental shelf for any purpose." It is noteworthy that the term "sovereign rights" rather than "sovereignty" is used in this article. The term "right", as one of the basic concepts under civil law which implies the distribution of benefits among equal subjects, can be deemed as the integration and mutual penetration of basic concepts under both

13 Sun Guohua and Yang Sibin, Division of Public Law and Private Law and Internal Structure of Law, *Law and Social Development*, No. 4, 2004. (in Chinese)

public law and private law.

B. Can the Regime under Domestic Law be Extended to the Field of International Law?

With their own definite objects and subjects of regulation as well as their distinctive method of formulation and implementation, international law and domestic law are clearly distinctive from each other, each forming a relatively independent and mutually exclusive legal regime on the whole. However, the two legal regimes are not isolated from each other, but in fact closely related with each other.

First, States are the bonds connecting international law and domestic law. As States not only formulate domestic law and but also participate in the formulation of international law, coupled with the consistency and coherence between domestic policies and foreign policies of a State, it is inevitable that there are certain necessary relations between international law and domestic law. In general, the foreign policies of a State are bound to influence its attitude towards and position on international law always but at the same time be influenced by its domestic law.

Second, the international society and the domestic society are the bases for the interrelations between international law and domestic law. Though international law is mainly rooted in and applied to the international society while domestic law the domestic society, the international society and the domestic society are not isolated from each other, and international matters and domestic matters regulated respectively by international law and domestic law interact with and depend on each other.[14]

Third, international law and domestic law are interrelated to each other out of the need to achieve their respective functions. In terms of international law, the principles and regimes of domestic law are constantly drawn upon and referred to during the formation and development of its principles and rules. For example, the "principle of fault" concerning State responsibility is derived from the Roman principle that "Essentially, the people who have no fault shall not be subject to any

14 Taking protection of human rights as an example, for quite a long time in the past, a State's treatment of human rights of its citizens and protection of human rights had been deemed as an issue relating to domestic law. However, nowadays, international protection of human rights has become a recognized frontier in international law.

restraint".[15]

With the development of international law, more and more individuals become subjects of international law, provisions under domestic law are included in various treaties, and there appears such legal order as that of the European Community. As a result, the distinction between international law and domestic law is not as clear as what it used to be but instead becomes more complicated.[16] As many regimes that used to be purely part of domestic law have already been applied into the field of international law, it is also likely that the regime of common ownership under civil law will be introduced into international law.

C. Is the Regime of Common Ownership Bound by the Tradition of Domestic Civil Law?

The regime of common ownership is a very complex regime. In primitive societies, the application scope of the regime covered almost all means of production and consumption. Later, personal means of production and consumption gradually got owned by families or individuals; with the development of society, land and other means of production also got owned by families or individuals in some societies.[17] However, during the process of privatization, not all property can be privatized. Even in a world where property is privatized and belongings may be used by their obligees at their own discretion, people also need to cooperate with each other in order to achieve economies of scale and advantages of cooperation. For the purpose of cooperation, property need to be merged to form jointly owned property. People establish a relationship of common ownership either because they are willing to merge their property for a common purpose or because of the need to maintain other legal relations. In human history, not all of the legislation is based on individuals. In a society where individual ownership has not yet been developed, common ownership is not based on clear individual ownership and the contents jointly owned often include public property, jointly owned property and

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15 Zeng Lingliang and Rao Geping ed., *International Law*, Beijing: Law Press China, 2005, p. 99. (in Chinese)

16 Jennings Watts ed., translated by Wang Tieya, Chen Gongchuo, Tang Zongshun and Zhou Ren, *Oppenheim's International Law*, Beijing: Encyclopedia of China Publishing House, 1995, p. 32. (in Chinese)

17 For example, based on Roman regime of family ownership of real estate, parents may enjoy absolute control over real estate. However, real estate was not owned exclusively by an individual parent.

other concepts of right.

In history, the two most typical regimes of common ownership are the regime of common ownership in Roman law and that in Germanic law. The regime of common ownership in Roman law reflects individualism characterizing Roman law. It can also be said that the reason why the transformable regime of common ownership was established in Roman law is that the Roman law was based on individuals. In contrast, a unique regime of general ownership[18] was created in Germanic society based on a unique social organization called "Mark", which was established on fixed social relations. In nature, it was completely different from the regime of common ownership in Roman law, in accordance with which personal property may be merged to be commonly owned or be divided to be owned by individuals. The underlying reasons for the formation of these two completely different regimes of common ownership are as follows: distinctions had been made since early times in Roman legal regime between private property and public property as well as trading items and non-trading items which made it unnecessary for Roman society to use the indefinite concept of collective ownership or group ownership to include private property and public property. In contrast, in Germanic law, all moveable property was owned by individuals while all real estates were commonly owned by the community. Both the property that belonged to all the members and the property that belonged to individuals were included into the concept of "common ownership". In other words, the common ownership herein includes the joint ownership and individual ownership in Roman law and is the community of people rather than the community of property. Therefore, the prototype of the legal concept of common ownership has different historical backgrounds.

The common property or common ownership established under the French Civil Code referred to the existing state of property owned by individuals, or a certain state where property owned by different individuals was merged. In French Civil Code, common ownership was not deemed as an independent type

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18 Under the regime of general ownership, ownership belongs nominally to all the members, while the subject of ownership has been actually abstracted as group without personality which is independent of the members. The members may own some shares, but such shares can never be converted to individual ownership. Such shares may only be demonstrated by usufruct but cannot be divided or converted to individual ownership. Essentially speaking, the regime of general ownership is a summary of the situation of Mark community system where arable land is owned by group but used in a scattered matter, and the usufruct belongs to the members.

of ownership, but a kind of ownership shared and jointly exercised by two or more people.[19] Common ownership was also explicitly stipulated in the 1907 Swiss Civil Code. It mainly referred to a type of common ownership conditioned by the dissolution of the property-based community which was established by several people in accordance with the law or a contract, that is, if such people intended to divide the property, the community shall be dissolved. Such commonly owned property was independent of every common will and served the needs of a particular community, reflecting the idea of a certain group-based or community-based common ownership. The Swiss Civil Code had achieved the transition from to individual-based common ownership to social-based common ownership.[20]

In short, legal provisions concerning the regime of common ownership are subject to the constraints by domestic civil law regime. Therefore, if the regime of the common ownership is introduced into the settlement of disputes over the delimitation of the shared continental shelf, relevant provisions in this regard under domestic civil laws of different States are likely to conflict with each other. However, due to the integration of legal culture as well as the mutual reference to and convergence of methods for lawmaking around the world at present, it is possible that regimes in the relatively new field of international law may be innovated. The differences between traditions of civil laws of different States will not constitute a fundamental obstacle to the introduction of the regime of common ownership into the delimitation of adjacent continental shelf between neighboring States.

D. Common Ownership of the Continental Shelf and the Theory of National Sovereignty

Based on the above analyses, we can see that there is a quite close relationship between public law and private law as well as between international law and domestic law. The regimes and principles thereof can penetrate into each other and be mutually referred to. Though the regime of common ownership in civil law cannot be used directly to settle the dispute over the ownership of the continental shelf, the author believes that it is completely feasible to refer to the basic

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19 Gao Fuping, *Principles of Property Law: Research on Basic Problems of Property Legislation in China*, Beijing: China Legal Publishing House, 2001, p. 232. (in Chinese)

20 Gao Fuping, *Principles of Property Law: Research on Basic Problems of Property Legislation in China*, Beijing: China Legal Publishing House, 2001, p. 237. (in Chinese)

principles thereof. In the late 1940s, the USA put forward concepts, filed claims related to the continental shelf, and believed that it was reasonable for a coastal State to exercise jurisdiction over the natural resources on the seabed and subsoil of the continental shelf. The reasons for these are mainly as follows: "The continental shelf, which should be deemed as the natural prolongation of the land of a coastal State, should the natural component thereof." The resources on the continental shelf are "often seaward prolongation of the oil fields and mineral deposits reserved in the land territory". Due to such reasons, the "principle of adjacency" in geography becomes legitimate and the coastal States have theoretical basis to make a claim on the seabed and subsoil of the continental shelf.[21] In 1955, during the process of preparing the draft of relevant provisions on the continental shelf, the International Law Commission interpreted the sovereign rights of a coastal State over the continental shelf as "all the rights that are necessary for development and utilization of the resources on the continental shelf of the coastal State, including the jurisdiction and the right to prevent and punish illegal acts". Therefore, such sovereign rights mean the right of a coastal State to possess, to occupy and to dispose of the natural resources on the continental shelf and the related jurisdiction. Such rights are different from the rights entitled to by a coastal State within its enclosed seas and territorial waters and are owned by a coastal State only for the purpose of exploring and developing natural resources.[22] It had been determined in the 1958 Geneva Convention on the Continental Shelf that the right of a coastal State to explore and develop natural resources on its continental shelf is exclusive and exists naturally ipso facto. Such rights do not depend on notional occupation, or on any express proclamation. This legal principle had been fully confirmed in the judgment of the *North Sea Continental Shelf Cases*. The judgment held that "the most fundamental of all the rules of law relating to the continental shelf, namely, that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right."

The interpenetration of basic concepts of public law and private law has been

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21 Zhou Zhonghai, *International Law of the Sea*, Beijing: China University of Political Science and Law Press China, 1987, p. 95. (in Chinese)

22 Lu Shouben, *Legal Regime of the Sea*, Beijing: Guangming Daily Press, 1992, p. 123. (in Chinese)

mentioned above. Due to the following reasons, the rights a State is entitled to over its coastal continental shelf are "sovereign rights" rather than "sovereignty": although these rights are inherent in territorial sovereignty and have the features of sovereignty, they may be exercised only for the purpose of exploring and exploiting the resources on the continental shelf; therefore, they have not been deemed as part of the overall territorial sovereignty.[23] The principle that "the land shall dominate the sea", recognized both in the UNCLOS and in international common law, allows the coastal State to designate internal waters along a normal baseline or a straight baseline and to own territorial waters no more than 12 nautical miles from the baselines from which the breadth of the territorial sea is measured, exclusive economic zone no more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and (in principle) continental shelf no more than 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. In other words, the sea area over which the coastal State owns territorial sovereignty or sovereign rights may be extended towards previous high seas. However, such extension of sovereignty will undermine the absoluteness of sovereignty at the same time. For example, according to one of the compromise solution in the 1982 UNCLOS, if one coastal State intends to develop the non-living resources on the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, it shall pay to the established authority expenses or in kind in accordance with UNCLOS which should be distributed based on the "standards of equitable sharing".[24] This is obviously different from the unilateral sovereignty a State may enjoy. It is required to make concessions of State power and to assign rights. In addition, in order to utilize transboundary natural resources jointly, some related States have reached agreement on a lot of international arrangements,[25] while other States have concluded many bilateral or regional treaties on equitable sharing of transboundary

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23 Jennings Watts ed., translated by Wang Tieya, Chen Gongchuo, Tang Zongshun and Zhou Ren, *Oppenheim's International Law*, Beijing: Encyclopedia of China Publishing House, 1995, p. 195. (in Chinese)

24 Jennings Watts ed., translated by Wang Tieya, Chen Gongchuo, Tang Zongshun and Zhou Ren, *Oppenheim's International Law*, Beijing: Encyclopedia of China Publishing House, 1995, p. 197 (in Chinese); please refer to the contribution proportion in the previous note, too.

25 For example, it was stipulated in the Charter of Economic Rights and Duties of States that "in the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others."

natural resources. Gradually, the concept of absolute sovereignty is being replaced by the concept of "equal utilization".[26]

Therefore, at present, if the regime of common ownership in theories on domestic civil law is introduced in to the settlement of the dispute over the delimitation of the continental shelf, there will be such obstacle pertaining to the absolute sovereignty as may be encountered in territorial delimitation. As early as the 17th century, the Dutch jurist Hugo Grotius had elaborated on the idea of freedom of the seas in many of his works. In modern time, his theory has been implemented in the legal fields concerning high seas. To a great extent, his idea of freedom of the seas may be said to be based on the theory that the seas connecting various States should be commonly owned by all human beings (commonly owned objects) and no State may have sovereignty over such commonly owned objects. However, from another perspective, his point of view may be understood as follows: every State may enjoy inalienable sovereignty over the high seas and interests in free navigation and free trade shall be equitably shared by all sovereign States. Thus, all sovereignty over the high seas has become the sovereign rights that are in the same nature as the private rights in the field of civil law. The inviolability of sovereignty remains unchanged, but the tendency towards equality and compromise becomes a new element involving the issue of sovereignty. Admittedly, the continental shelf is different from the high seas. It was impossible for Hugo Grotius to elaborate on the distribution of benefits gained from relevant activities on the continental shelf due to the historical and technical background of his time. Due to such restrictions as geographical conditions,[27] in terms of the distribution of benefits gained from relevant activities on the continental shelf, the continental shelf is between high seas and land territory in nature. The continental shelf is

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26 For example, it was pointed out in the 1957 *Lake Lanoux Arbitration* that when French planned to carry out certain watercourse splitting work in a part of Lake Lanoux which was under the control of French, it was obliged to notify the Spanish Government of the matter and solicit the opinions of the Spanish Government because in accordance with the provisions of a related treaty, such matter could not be simply deemed as a matter within the French territory, otherwise France shall be liable for breach of the treaty. See Yang Zewei, On the Permanent Sovereignty over Natural Resources in International Law and Its Development Tendency, *Studies in Law and Business*, No. 4, 2003. (in Chinese)

27 In Section III hereof, various factors affecting the delimitation of and the ownership of benefits of the continental shelf in the past are further analyzed. The characteristics of the continental shelf determine that the disputes over the delimitation of the continental shelf are complex and flexible. Such characteristics also make it quite possible for us to be flexible in settling new disputes over the continental shelf.

not shared by all human beings, nor is it absolutely and exclusively controlled by any State. In addition to the vague non-legal concept of "shelving sovereignty and seeking joint development", common ownership of the continental shelf by certain States is also one of the compromise solutions that are not restricted by the principle of sovereignty.[28]

IV. Coordination between Traditional Methods for and the Application of the Regime of Common Ownership into the Settlement of Disputes over the Delimitation of the Continental Shelf

A. Traditional Factors Affecting the Delimitation of the Continental Shelf

From the existing judgments and rulings, the relevant factors that should be considered during the delimitation of the continental shelf include geographical, geological, and geomorphological factors, acts of interested States, the interests of the third State, protection of the uniformity of resources and equal utilization of natural resources, among which geographical factors are of particular importance. In international judicial and arbitral practices, the following relevant circumstances are often taken into account: 1. Geographical factors. For example, the shape of the

28 It should be noted that China's positions on the issues concerning the delimitation of the South China Sea are different from China's positions on the issues concerning the delimitation of the East China Sea. There are many islands in the South China Sea and such islands are surrounded by the territorial waters of China. Therefore, the issues concerning the delimitation of the South China Sea belong to sovereignty-related issues, including the issues concerning the delimitation of the continental shelf; in contrast, in terms of the issues concerning the delimitation of the South China Sea, there are no disputes over the territorial waters of China; the issues focus on the delimitation of the continental shelf and the distribution of seabed resources.

coast[29] and proportionality[30] among which proportionality is one of the important geographical factors, which refers to the relationship between the length of the related coastline of the State parties adjacent to the sea area to be delimitated and the related sea area obtained by the State parties through delimitation.[31] 2. Geological and geomorphological factors. In light of the development of international judicial and arbitral practices, although the role of geological and geomorphological factors in maritime delimitation is being gradually downplayed, they should be taken into account in delimitating the continental shelf beyond 200 nautical miles from the territorial sea baselines of the State parties.[32] 3. Previous

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29 It was recognized in the 1969 *North Sea Continental Shelf Cases* that "the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features" should be the factors to be taken into account during the delimitation of the continental shelf. In 1971, the five agreements on the delimitation of the continental shelves in the North Sea region were signed in accordance with the judgment results of the 1969 *North Sea Continental Shelf Cases.* In the 1982 *Case Concerning the Delimitation of the Continental Shelf (Tunisia v. Libya)*, the ICJ held that "the change to the direction of the coast is a fact that must be considered". In the 1985 *Maritime Delimitation Case (Guinea V. Guinea-Bissau)*, the arbitral tribunal considered the "general trend of the coastline" and "the general shape of the coast".

30 In the 1969 *North Sea Continental Shelf Cases*, the ICJ confirmed that "the factor that should be taken into account in the end is the element of a reasonable degree of proportionality between the extent of the continental shelf areas appertaining to each State and the length of its coast in the delimitation completed based on the principle of equity". In the 1985 *Case Concerning the Delimitation of the Continental Shelf (Libya v. Malta)*, the ICJ considered proportionality as a factor that shall be taken into account when adjusting the median line between States with opposite coasts. In the 1993 *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen*, the Court held that when the equidistance line approach was applied in the circumstances of the case, the relationship between the length of the relevant coasts and the maritime areas generated by them would be disproportionate, so it is necessary to consider the disparity between the respective coastal lengths of the State parties in case of maritime delimitation.

31 Yuan Gujie, Reflections on Issues Concerning the Delimitation of the Continental Shelf, *Peking University Law Journal*, No. 5, 1998. (in Chinese)

32 In the 1969 *North Sea Continental Shelf Cases*, the ICJ pointed out that "delimitation was to be effected by agreement in accordance with equitable principles and taking account of all relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constituted a natural prolongation of its land territory, without encroachment on the natural prolongation of the land territory of the other." In the *1977 United Kingdom-France Continental Shelf Arbitration*, the arbitral tribunal endorsed the foregoing conclusions of the ICJ in the *North Sea Continental Shelf Case*s. In the 1985 *Case Concerning the Delimitation of the Continental Shelf (Libya v. Malta)*, the ICJ held that "since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 nautical miles from its coast, whatever the geological characteristics of the corresponding seabed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims."

acts of the State parties.[33] 4. Equal use of natural resources.[34]

In the settlement of contemporary delimitation disputes, in addition to traditional factors, we should also consider factors relating to international relations and historical factors. In theory, when the boundary defined in the delimitation is too close to the coast of a State, safety factors should be listed among potential relevant factors. However, from the current international judicial and arbitral practices, safety factors have not been asserted as one of the factors relating to delimitation.[35] With regard to historical factors, there also exists the problem of uncertainty. In the 1982 *Case Concerning the Delimitation of the Continental Shelf (Tunisia v. Libya)*, the ICJ noted that "the question of Tunisia's historic rights may be relevant for the decision in the present case in a number of ways". However, after reviewing the case, the Court "thus does not find it necessary to pass on the question of historic rights as justification for the baselines. It is only if the method of delimitation which the Court finds to be appropriate is such that it will or may encroach upon the historic rights area that the Court will have to determine the validity and scope of those rights, and their opposability to Libya, in the context of a delimitation of the continental shelf". However, in the 1998 *Arbitration (Eritrea v. Yemeni)*, when concluding the arbitration agreement, the two State parties made a special request that the arbitral tribunal should make judgment on all issues concerning territorial sovereignty based on historical ownership. Thus,

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33 In the 1982 *Case Concerning the Delimitation of the Continental Shelf (Tunisia v. Libya)*, the ICJ held that it must consider the boundaries the two State parties might believe to be equitable, or believed to be equitable and acted based thereon, as long as these boundaries had been temporary solutions, even if these boundaries had affected only a part of the area to be delimitated.

34 In the 1993 *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen*, equal use of natural resources was listed for the first time as one of the related factors to be taken into account during delimitation. The Court held that both the State parties had emphasized the importance of the maritime resources in the area to their respective interests.

35 In the 1977 *United Kingdom-France Continental Shelf Arbitration*, the Court believed that these factors would not play a decisive role in the delimitation in the case. They could support and strengthen, but could not oppose the conclusions demonstrated by the geographical, political and legal conditions of the area that had already been verified by the Court. In the 1993 *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen*, the ICJ insisted that safety factors should not be independent of the concept of sea area. However, the boundary determined in this case was not close enough to the coast of one State party to enable safety issues to become a factor in need of special consideration.

great importance was attached to historical ownership in the judgment of the case.[36] With regard to the issues concerning the delimitation of the continental shelf of China, many scholars in China laid particular emphasis on the role of historical factors as evidences which can be used in the settlement of disputes concerning the delimitation of the continental shelf in order to safeguard the national interests of China.[37] However, in their virtual defense, they unilaterally emphasized the factors favorable to China, used different rhetoric for disputes in different sea areas, and even deemed historical factors as the main reason for the ownership of rights and interests. Therefore, such opinions can only be their own wishful thinking.

Substantially speaking, the foregoing factors will not conflict with common ownership of the continental shelf. By introducing the concept "common ownership", which is vague in the delimitation of actually owned rights and interests but clear in terms of legal definition, the parties can turn the "black or white" delimitation disputes into negotiations on the sharing of acquired rights recognized by both parties. If the dispute really arose out of State parties' consideration of economic interests which can be gained from the development of resources, the introduction of the regime of common ownership can maximize the economic interests of both State parties by preventing the adverse effects of all of the foregoing factors.

B. Coordination of and Conflicts between the Regime of Common Ownership of the Continental Shelf and Accompanying Rights and Obligations Relating to the Continental Shelf

According to Article 77 to Article 81 of the UNCLOS, the rights of coastal States over their continental shelves include: 1. exploitation of natural resources, including the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species; 2. exclusive rights to authorize and manage drilling of the continental shelf for all purposes; 3. rights to construct and to authorize construction of, to operate, use and manage artificial

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36 In the *Arbitration (Eritrea v. Yemeni)*, the arbitral tribunal believed that "there is no doubt that the concept of historical ownership has a special impact on all possible circumstances in the current world."

37 For example, some people believed that "historical ownership is an acquired right clearly recognized and protected by the UNCLOS and international common law". Please refer to Zhao Jianwen, The UNCLOS and China's Acquired Rights in the South China Sea, *Chinese Journal of Law*, No. 2, 2003. (in Chinese)

islands, installations and structures; exclusive jurisdiction over such artificial islands, installations and structures.[38] It should be noted that a coastal State's exercise of its sovereign rights over its continental shelf, shall not affect the legal status of the superjacent waters or of the air space above those waters as well as the legal rights of the other State over the continental shelf,[39] for the rights of non-specific States over the continental shelf of a State are also stipulated in Article 78 and Article 79 in the UNCLOS, in compliance with which: 1. the superjacent waters of the continental shelf or the air space above those waters shall be open to all States; the ships and aircrafts of any State may navigate through or fly over those waters or the air space above those waters; 2. all States are entitled to lay submarine cables and pipelines on the continental shelf; subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.

Just like the dual character of ownership in the field of private law, the rights of a State over the continental shelf are neither absolute nor unconditional. In addition to the right to develop resources and obtain benefits, there are also a series of accompanying rights and obligations for other States.[40]After common ownership of the continental shelf is finally realized, there will exist mutual rights and obligations between the two States as well as accompanying rights and obligations

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38 The foregoing rights of the coastal State are the rights over the continental shelf within 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Please refer to the provisions of Article 82 of the UNCLOS.

39 As regards the legal status of the superjacent waters or of the air space above those waters, it was stipulated in Article 78(1) of the UNCLOS that "the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters." For the continental shelf within 200 nautical miles from the baselines, the provisions in the UNCLOS concerning the exclusive economic zone shall be applicable to the superjacent waters or the air space above those waters; for the continental shelf beyond 200 nautical miles from the baselines, the regimes of high seas shall be applicable to the superjacent waters or of the air space above those waters.

40 The "accompanying rights" herein do not mean that these rights are unimportant, but that these rights are accompanying compared with the main purpose, i.e., the development of the resources on the continental shelf.

between such States and a third State.[41] Whether there is one owner or more of the continental shelf, the owner(s) is/are entitled to the same rights and under the same obligations toward the third State. The distribution of rights and obligations between the co-owners in their joint management of the continental shelf may be determined with reference to relevant provisions on the regime of common ownership under traditional civil law, demonstrated mainly by the management of the commonly owned by them.

The principle under civil law on the management of commonly owned property is that the commonly owned property shall be handled in accordance with the original treaty if there is one, otherwise it shall be managed jointly by the parties concerned. Whatever be the type of the common ownership, all acts relating to the preservation the commonly owned property, the purpose of which are to maintain the current status of such property and prevent any loss or damage to such property, or any loss of or restriction on any right to such property, can be conducted alone by any of the co-owners without soliciting the opinions of the other co-owners. All acts relating to the improvement of the commonly owned property, the purpose of which is to increase the effectiveness or value of the commonly owned property without changing its nature, shall be conducted upon joint decision, for such acts are not so urgent as the foregoing acts and may involve high expenses but not necessarily increase the effectiveness or value of the commonly owned property.[42] With regard to the continental shelf, the accompanying rights and obligations arising from common ownership are more complex and may at the same time be often affected by diplomatic relations and the overall international environment, the influence of which are next to zero in the current situation. As for specific details on the joint management, they may be negotiated again and again between co-owners.

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41 In the 1969 *North Sea Continental Shelf Cases*, the ICJ attached importance to the interests of the third State. According to the judgment, one of the relevant factors in the delimitation of the continental shelf is "to take account of the effects, actual or prospective, of any other continental shelf delimitations in the same region". In the 1982 *Case Concerning the Delimitation of the Continental Shelf (Tunisia v. Libya)*, the ICJ emphasized "reservation of the rights of a third State". Gu Yuanjie, Reflections on Issues Concerning the Delimitation of the Continental Shelf, *Peking University Law Journal*, No. 5, 1998. (in Chinese)

42 Yang Lixin, *Study on Common Ownership*, Beijing: Higher Education Press, 2003, p. 58. (in Chinese)

C. Delimitation of the Continental Shelf between Multiple States and Applicable Standards for the Regime of Common Ownership: a Case Study of the Delimitation of the Continental Shelf in the East China Sea

At the 3rd Meeting of the Standing Committee of the Ninth National People's Congress of China On June 26, 1998, the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China was adopted, in which were established the basic regime of the exclusive economic zone and that of the continental shelf. In accordance with the Law, China may claim the exclusive economic zone extending to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and the continental shelf which is part of all the natural prolongation of China's land territory. According to a preliminary estimate, China may claim jurisdiction over a sea area of about 3 million square kilometers. However, there are four seas on the east of the continental shelf of China. Among them, there are disputes between China and other States concerning the delimitation of the continental shelf in the Yellow Sea, the East China Sea, and the South China Sea. However, up till now, except the agreement between China and Vietnam on the delimitation of the sea area of the Beibu Gulf,[43] no other agreement has been concluded between China and other States on the delimitation of the sea area under jurisdiction. Given China's special geographical position, China is faced with far more complicated disputes concerning the delimitation of the continental shelf than those faced by any other States or regions in the world.

The dispute between China and Japan over the resources on the continental shelf in the East China Sea stems from Japan's escalating reaction to China's development of Chunxiao Oil and Gas Field in the sea area on China's side of the "median line" in the East China Sea since May 2004. In 2004, China's foreign

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43 It was stipulated in Article 6 of the Agreement between the People's Republic of China and the Socialist Republic of Vietnam on the Delimitation of the Territorial Sea, the Exclusive Economic Zone and the Continental Shelf of the Beibu Gulf which was concluded on December 25, 2000 in Beijing that "both parties shall respect the sovereignty, sovereign rights and jurisdiction of the other party over their respective territorial seas, exclusive economic zones and continental shelves in the Beidu Gulf determined in accordance with this Agreement." It was stipulated in Article 7 of the foregoing Agreement that "if any petroleum, natural gas single geological structure or other mineral deposit straddles the boundary stipulated in Article 2 of this Agreement, through friendly consultations, both parties shall reach an agreement concerning the most efficient development of such structure or mineral deposit as well as equitable sharing of the development benefits thereof".

minister made the appeal that China and Japan should shelve the differences and conduct joint development of the resources in the East China Sea and expressed his hoped that Japan would carry out a research on his proposal, to which, however, Japan did not respond actively. As each coastal State is entitled to certain rights in its offshore areas in line with the UNCLOS, a considerable part of China's scope of rights overlaps with that of Japan relating to the continental shelf in the East China Sea.[44] It is both lawful and undisputable for both China and Japan to make their respective claim on the continental shelf either in compliance with the principle of natural prolongation or Article 76 of the UNCLOS which provides that the outer limits of the continental shelf can be extended to up to 200 nautical miles from the territorial baseline. However, when such unilateral claims of both States result in conflicts over rights in the East China Sea, there is no doubt that the principle of natural prolongation shall be predominant over the provision on the outer limits of the continental shelf under Article 76 of the UNCLOS. As China's continental shelf in the East China Sea is consistent with the land of China therein in terms of topography, geomorphology, sedimentary characteristics, and geology, is the

44 Article 1 and Article 2 of the 1996 Law of Japan on the Exclusive Economic Zone and the Continental Shelf stipulate that Japan's exclusive economic zone and continental shelf shall cover the area measured from the baselines of its territorial sea and extending outward to the line every point of which is at a distance from the nearest point of the baseline equal to 200 nautical miles. Where any part of the outer edge of the margin of the exclusive economic zone and the continental shelf goes beyond the median line, the median line (or other line agreed upon between Japan and other States) will replace that part of line. Please refer to Yu Mincai, Analysis of the Dispute between China and Japan over the Oil and Gas in the East China Sea from the Perspective of International Law, *Studies in Law and Business*, No. 1, 2005 (in Chinese). Article 2 of the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China,1998, states that China's exclusive economic zone shall cover the area extending to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and China's continental shelf shall be the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured under certain conditions.

natural prolongation of China's land territory underwater.[45] Therefore, China has inalienable sovereign rights over the continental shelf in the East China Sea which extends all the way to the Okinawa Trough. If the continental shelf of any other State overlaps with that of China in the East China Sea, the overlapping part shall be delimitated between China and the State through friendly consultations. Any unilateral attempt to change the status quo is legally groundless.[46]

It has been China's consistent stance that such disputes shall be settled peacefully and equitably through friendly consultations between the parties concerned in accordance with the UNCLOS and international customary law and in consideration of a variety of factors and circumstances. Due to the diplomatic estrangement and protracted historical hostilities between China and Japan, it will be very difficult to apply the regime of common ownership into the delimitation of the continental shelf between China and Japan. Thus, it is clear that in addition to the obstacles caused by the theory of national sovereignty, international relations will also play an important role in the application of the regime of common ownership. As China has a number of neighboring coastal States, it is an inflexible approach to apply a uniform standard. Therefore, the author of this paper is in the opinion that different standards should be applied for the realization of common ownership of the continental shelf between China and different countries.

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45 The Okinawa Trough constitutes a natural boundary between the continental shelf of the East China Sea and the island shelf of the Ryukyu Islands of Japan because the geological structure on the eastern side of the trough is entirely different from that on the western side of the trough in nature. On the western side of the trough is stable continental crust while on the eastern side of the trough is Ryukyu Island Arc with very active crustal movements and frequent earthquakes. The sediments on the eastern and western side of the trough belong respectively to two source areas, island shelf of the Ryukyu Islands and the continental shelf of the East China Sea. The sediments on the edge of the continental shelf of the East China Sea and the western slope of the trough are similar to the substances in the Yangtze River in nature while the sediments on the eastern slope of the trough are closely associated with the Ryukyu Islands in nature. The trough itself belongs to a zone in transition from a continental crust to an oceanic crust. Its topography is different from that of both a flat continental shelf of the type of accumulation and deposition and oceanic ridges and basins of the type of oceanic crust. It is a unique topographical unit. The continental shelf of the East China Sea extends to the foot of the western slope of the Okinawa Trough, while the island shelf of the Ryukyu Islands extends to the foot of the eastern slope of the Okinawa Trough. Please refer to Yu Mincai, Analysis of the Dispute between China and Japan over the Oil and Gas in the East China Sea from the Perspective of International Law, *Studies in Law and Business*, No. 1, 2005. (in Chinese)

46 Li Guangyi, The International Legal Basis on the Delimitation of the Continental Shelf of East China Sea, *Contemporary Law Review*, No. 3, 2005. (in Chinese)

V. Joint Development Based on Common Ownership of the Continental Shelf: Autonomy of Will and Conflict of Laws between States

A. Why Joint Development Based on the Regime of Common Ownership Is the Ideal Method for the Development of the Resources on the Continental Shelf?

The concept of joint development can be interpreted either in the narrow sense or in the broad sense. In the narrow sense, it refers to joint development of resources within a certain area, mainly oil and gas resources, by the States concerned based on an agreement. In the broad sense, it refers to joint development of resources within a certain area, including oil and gas resources, fishery resources and so on, by the States concerned based on an agreement.[47] Joint development should be conducted in two differentiated forms, namely, cross-border joint development in the case where maritime boundaries has been established[48] and joint development in a disputed area in the case where the maritime boundary has not

47 Chen Degong, Principles of International Law and International Practices of Joint Development, *Tsinghua Law Review*, No. 4, 2002. (in Chinese)

48 There are 8 cases of cross-border joint development: (1) the 1958 Agreement on Joint Development of the Continental Shelf of the Persian Gulf between Bahrain and Saudi Arabia; (2) the 1969 Agreement on Joint Development between Qatar and Abu Dhabi; (3) the 1974 Agreement on Delimitation and Joint Development between France and Spain; (4) the 1974 Agreement between Sudan and Saudi Arabia; (5) the 1976 Agreement on Joint Development of Frigg Oil Field between Britain and Norway; (6) the 1981 Agreement on Joint Development between Iceland and Norway (Jan Mayen); (7) the 1988 Agreement on Joint Development of the Continental Shelf between Libya and Tunisia; (8) the 1993 Agreement on Management and Cooperation between Senegal and Guinea-Bissau.

yet been defined.[49] It has been accepted by the vast majority of scholars that joint development can be classified in accordance with whether maritime boundaries have been established or not. The different functions of joint development have been also taken account of in such classification. Specifically, the major importance is attached to economic interests in cross-border joint development while political gains, such as the mitigation of disputes and the improvement of relations, have also been taken account of in addition to economic interests in joint development in a disputed area.[50]

However, it is inevitable that the foregoing categories of joint development in the traditional sense can only be conducted in a temporary basis. Generally speaking, cross-border joint development will come to an end with the termination of the commercial production of cross-border petroleum while joint development in disputed sea areas, which is not a permanent arrangement for delimitation dispute, will be generally terminated when it's no longer necessary after the final delimitation of maritime boundaries or the establishment of a joint development zone. As stipulated in Article 74 and Article 83 of the UNCLOS, which were formulated for the purpose of delimitating the exclusive economic zone and the continental shelf, pending agreement on the delimitation of the continental shelf, the States concerned, in a spirit of understanding and cooperation, shall make every

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49 There are 13 cases of joint development in disputed sea areas: (1) the 1962 Agreement on Joint Development of the Resources in the Ems Estuary between Netherlands and the Federal Republic of Germany; (2) the 1965 Agreement on Joint Development between Kuwait and Saudi Arabia; (3) the 1967 Agreement on Joint Development between Iran and Iraq; (4) the 1971 Agreement on Joint Development between Iran and Sharjah; (5) the 1974 Agreement on Joint Development of the Continental of the East Sea between Japan and South Korea; (6) the 1979 Memorandum of Understanding on Joint Development between Thailand and Malaysia; (7) the 1988 Agreement on Joint Development between South Yemen and North Yemen; (8) the 1989 Agreement on Joint Development of the Timor Sea between Australia and Indonesia; (9) the 1992 Agreement on Joint Development between Malaysia and Vietnam; (10) the 1993 Agreement on Maritime Delimitation and Joint Development between Columbia and Jamaica; (11) the Argentina-U.K. Joint Declaration on Cooperation over Offshore Activities in the Southwest Atlantic, 1995; (12) the Protocol of February 2001 between Nigeria and Sao Tome and Principe concerning Joint Development of Petroleum and other Resources in the Exclusive Economic Zones of both States in the Gulf of Guinea; (13) the Memorandum of July 2001 between Australia and the Temporary Regime of East Timor Concerning Cooperative Arrangements on the East Timor Sea.

50 In the case concerning the delimitation of the continental shelf in the Aegean Sea, the ICJ pointed out that when unilateral development of the continental shelf would cause irreparable damage to the related rights, or was most likely to cause actual damage to related seabed or subsoil, international law would support the obligation to prohibit such unilateral development.

effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. However, what on earth does the "final agreement" stipulated in the UNCLOS refer to, an agreement on the delimitation of the continental shelf or any further and formal agreement on joint development of resources? It remains unclear - joint development of the resources on the continental shelf on a temporary basis is very likely to be closely associated with domestic interests and accompanied with short-term acts that are not conducive to sustainable development. In addition, such temporary cooperation between States is unstable. The author believes that distribution of interests may be better realized during the development of resources only when joint development of the resources on the continental shelf is conducted based on common ownership of the continental shelf. In this way, as both parties have settled the disputes over the ownership and better clarified their respective rights and obligations, the marine environmental of the sea area on the continental shelf can also be better protected, and there will be no such short-term acts as joint development conducted only for economic interests, predatory development for which no party will assume any risk and responsibility.

B. Issues Concerning the Composition and Operation of Development Consortium in the Fields of Conflict of Laws

In the opinion some people, subjects of joint development in the broad sense include sovereign States, transnational or non-multinational enterprises, and enterprise groups while in the narrow sense two or more States conducting exploration and development of natural resources in disputed sea areas on the basis of an agreement achieved through negotiations and in compliance with international law. As can be seen from previous cases in respect of the composition of subjects for joint development, there are three main models:[51] 1. agency management model, namely, a State party manages the joint development zone on behalf of both parties and the laws of the agency State are applied to the joint development zone;[52] 2. forced joint venture model, namely, both States divide the

51 Xiao Jianguo, The Concept of Joint Development and Its Characteristics in International Law, *Foreign Affairs Review*, No. 2, 2003. (in Chinese)

52 The 1958 Protocol, after having delimitated the boundary between Bahrain and Saudi Arabia in the Persian Gulf, further provided that Saudi Arabia had the right to manage and exploit the oil fields within its territory but half of net income shall be paid to Bahrain.

joint development zone into several parts based on a protocol and establish the lessee operating system; the laws of the operator authorizing State are applied to the related exploration and development activities conducted in each sub-region;[53] and 3. supranational management model, namely, the related States authorize the joint authority to be fully responsible for the joint development zone; within the joint development zone, there is only one work plan, one tax system, one budget and one legal system.[54]

The author believes that it is rather easy to establish and manage the agency management model because it involves the use of the management mechanisms of only one State and does not involve coordination of the related legal regimes of two States. However, this model is not feasible because when one party exercises the sovereign rights over the resources as proxy for the other party, the other party is likely to have the worry that the two parties are not in an equal status and may even think that its sovereign rights over the resources are damaged or lost. If the supranational management model is applied, administrative costs may be reduced significantly and the working efficiency can be improved. However, this development model also has some shortcomings. For example, when two States agree to establish a supranational institution, they must coordinate with each other and reach a consensus on their respective duties, personnel composition, working procedures, system for development, applicable laws and other key issues. Such coordination is very difficult between two States with different legal systems and it

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53 In the 1974 Protocol between Japan and South Korea on Joint Development of the Continental Shelf in the East China Sea, this model concerning the subjects of joint development was put into practice for the first time. The 1974 Protocol set a joint development zone with an area of 84,000 square kilometers, located between the "median line" of the continental shelf in the East China Sea claimed by Japan and the natural prolongation claimed by South Korea. The 1974 Protocol intended to shelve the 50-year dispute between both parties over the delimitation and facilitate joint development of the resources on the continental shelf. However, from the perspective of international law and national sovereignty, the 1974 Protocol between Japan and South Korea was a serious encroachment on China's sovereign rights over the continental shelf in the East China Sea.

54 A typical example for this management model is the one stipulated in the 1989 East Timor Gap Treaty between Australia and Indonesia. The treaty designated the sea area in East Timor Sea under the dispute between both parties as the cooperation zone which was further divided into three regions based on their distances from the coastlines of both States. Different exploration and development regimes were applied to each different region. The joint authority established by both States was fully responsible for all exploration and development activities conducted in the area in the middle of the continental shelves of both States. The joint authority has a legal personality and the necessary legal capacity for performing its functions as required by the laws of both States, such as licensing, signing contracts, acquiring and disposing of movable and immovable property, etc.

is necessary for both States to make concessions to varying degrees. Therefore, the consortium for joint development based on common ownership of the continental shelf shall be in the broad sense and shall not be limited to States. After both States have reached a consensus over the ownership of the continental shelf, the continental shelf under dispute will have a legal status as agreed upon by common opinions (interests) of both States. Both States can withdraw completely from the subsequent commercial operations such as development of resources and only undertake matters relating to ordinary management of the continental shelf. The model of forced joint venture makes it unnecessary to coordinate the laws of both States, showcasing high efficiency, equality, and simplicity, which characterizes commercial activities.

VI. Conclusions

Based on an analysis of the problems with disputes between the relevant States over the delimitation of the continental shelf since the last century, this paper puts forward a possible new solution to disputes over the continental shelf which is different from the previous solution of "shelving sovereignty and seeking joint development" by referring to and introducing the regime of common ownership in the field of domestic civil law. Such reference and introduction is based on the convergence of public law and private law as well as that of international law and domestic law, which has been also elaborated in this paper. However, this proposed solution can only be deemed as an assumption. It is inevitable that the proposed attempt to settle disputes concerning the sovereign rights over the continental shelf through common ownership will be hindered in actual practice by obstacles caused by the complicated distribution of interests among States. Adjustments will be made to the regime of common ownership originated from the field of private law in consideration of historical factors, national policies, international relations and other factors, which will more or less change the original regime. In the end, the introduced regime of common ownership may even become completely different from the original regime. Even if the concept of common ownership is accepted in the field of the continental shelf, the ideal situation, where joint development of resources is conducted through the model of forced joint venture by a legal consortium backed by States on the basis of common ownership of the continental shelf, will remain to be bound by a variety of special regimes under both domestic and foreign economic laws. In addition, there are also many difficulties and gaps

in terms of applicable laws. However, the author believes that under the current situations, pilots on common ownership of the continental shelf can be gradually conducted between States whose continental shelves are adjacent to each other and who have sound diplomatic relations but relatively few conflicts of interests with each other.

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